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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 312

JOHN M. TAYLOR, OSCAR A. KENNEDY and H. RUSSELL HASTINGS, as the Independent Committee for the Protection of the Holders of Preferred Stock of Deep Rock Oil Corporation, Debtor,

Petitioners,

vs.

STANDARD GAS AND ELECTRIC COMPANY; REORGANIZATION COMMITTEE OF DEEP ROCK OIL CORPORATION; H. N. GREIS, Trustee of Deep Rock Oil Corporation; and DEEP ROCK OIL CORPORATION,

Respondents.

BRIEF ON BEHALF OF THE MEMBERS OF THE REORGANIZATION COMMITTEE OF DEEP ROCK OIL CORPORATION, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF THE MEMBERS OF THE REORGANIZATION COMMITTEE OF DEEP ROCK OIL CORPORATION, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

INTRODUCTORY STATEMENT

The petitioners, a minority group of preferred stockholders of Deep Rock Oil Corporation, debtor in a proceeding pending in the District Court of the United States for the Northern District of Oklahoma under Section 77B of the Bankruptcy Act as amended, seek the review by this Court of the order entered by the

District Judge on February 3, 1937, and affirmed by the Circuit Court of Appeals for the Tenth Circuit which ended four years of effort by the District Court and the interested parties to effect a reorganization of the debtor's complicated financial affairs.

The order of the District Judge, entered in the exercise of his discretionary power, approved a compromise at approximately $5,000,000 of an unsecured claim for $9,342,000 plus interest, asserted by Standard Gas and Electric Company (hereinafter referred to as "Standard"), the parent corporation of the debtor, and confirmed an amended plan of reorganization based upon such compromise, which plan subordinated Standard to other creditors. The compromise had been approved by counsel for the independent Trustee in Bankruptcy, by the holders of more than 82% of the debtor's $10,000,000 note issue, and by the holders of more than 58% of the debtor's $5,000,000 preferred stock issue. The plan of reorganization had been accepted by the holders of the same percentages of notes and preferred stock, respectively, which had approved the compromise. The order of the District Judge, as affirmed by the Circuit Court of Appeals, rests upon the particular facts of this case and accomplished, to use the phrase of Section 77B, a "fair and feasible" adjustment of the conflicting rights of the various classes of interested parties. The questions raised by the petitioners are based upon a partisan interpretation of the extensive record, and do not involve, in the words of former Chief Justice Taft, either "principles the settlement of which is of importance to the public as distinguished from that of the parties" or "a real and embarrassing conflict of opinion and authority." *Layne* v. *Western Well Works*, 261 U. S. 387, 393 (1923).

II.

STATEMENT OF THE FACTS

We cannot agree with the "Statement of the Matter Involved," found on pages 2 to 36 of the petition. The statement is neither correct nor fair, and consists in large measure of incomplete excerpts selected from the long record to present a prejudiced point of view. Since Circuit Judge Phillips has carefully reviewed the facts in the opinion of the Circuit Court of Appeals (96 F.(2) 693, 696-703; Record, Vol. I, pp. 478-491), we shall not undertake a restatement, and desire only to supply flagrant omissions and correct inaccuracies in the petition as follows:

1. In declining to approve the first offer of compromise of the Standard claim, the District Judge, in September, 1935, did not find the claim to be invalid but obviously sought to induce a new offer of compromise based on a different plan from that then before the court, for the purpose of improving and enlarging the participation allotted to preferred stockholders. (Vol. II, pp. 407-411.) This purpose was effectuated in the subsequent approval of the new compromise and amended plan. (Vol. II, p. 726.) As stated by the Circuit Court of Appeals:

> ". . . The refusal was not predicated on the ground that the claim should not be compromised, but rather on the proposition that the compromise and the plan were definitely related; that the compromise should be made an integral part of the plan, and that considered together the offer was not fair." (96 F. (2) 693, 700; Vol. I, p. 486.)

2. Petitioners erroneously state (Pet. 27 and 33) that counsel for the Trustee did not recommend the acceptance

of the compromise as approved. The record shows that the Trustee left to his counsel the question as to whether or not the second compromise should be recommended (Vol. II, p. 523), and that at the conclusion of the confirmation hearing, when the proofs had been closed, counsel for the Trustee, on behalf of the Trustee, stated as follows:

> "First, I represent the trustee, and concur with Mr. Gibson in recommending this settlement to the court. I want to say this much, that I regard that settlement as a good settlement. * * *" (Vol. II, p. 561.)

3. Petitioners have conspicuously omitted to state the fact that the $5,000,000 compromise figure eliminates every debatable item in the Standard claim. (Vol. II, pp. 389, 562, 563, 704; Vol. I, p. 201.) The settlement figure consists solely of actual cash advanced by Standard to Deep Rock or paid by Standard to third parties in satisfaction of Deep Rock obligations, together with a portion of the sums spent by Standard in acquisition of the Refining Company properties (which are to be conveyed to Deep Rock, for no additional consideration, under the terms of the compromise), together with interest at 5% on said items. (Vol. II, pp. 704, 559.)

The Circuit Court of Appeals found as follows:

> "The new offer eliminated all questionable items in the Standard claim which the trustee and his counsel felt were subject to disallowance on their merits." (96 F. (2) 693, 701; Vol. I, p. 488.)

The compromise figure therefore did not include any allowance for rental on the Refining Company properties, for management fees, for interest in excess of 5%, for dividends, or for any of the controverted items which

were contained in the open account. Since the Standard claim which was compromised accrued subsequent to April 12, 1928 (as specifically found by the Circuit Court of Appeals—96 F. (2) 693, 698; Vol. I, p. 483), the many transactions occurring prior thereto, and referred to by petitioners, are immaterial.

III.

ARGUMENT

SUMMARY OF ARGUMENT

A. There can be no doubt of the discretionary power of a District Judge in a proceeding under Section 77B of the Bankruptcy Act to compromise claims asserted against the estate.

B. Certiorari should not be granted to determine from the facts whether or not the District Judge, in approving a particular compromise, was guilty of an abuse of discretion.

C. This Court will not review a finding of fact as to the value of the debtor's property lawfully made by the District Judge and affirmed after review by the Circuit Court of Appeals.

D. The case does not involve any question of public importance.

ARGUMENT

A. There can be no doubt of the discretionary power of a District Judge in a proceeding under Section 77B of the Bankruptcy Act to compromise claims asserted against the estate.

The authorities are unanimous in holding that a District Judge, in the exercise of jurisdiction over the affairs of a corporation, either in receivership or bankruptcy, has the discretionary power to approve the settlement and compromise of claims against the estate. The Bankruptcy Act expressly so provides by Section 27. (11 U.S.C.A., Sec. 50.) Section 77B(a) also provides that the District Court "shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have had it appointed a receiver in equity of the property of the debtor . . ." (11 U.S.C.A., Sec. 207(a).) The power has been frequently exercised in proceedings under Section 77B. *In re Prudence Co.* (C. C. A. 2, July 18, 1938) 384 Commerce Clearing House Fed. Tax Serv., Par. 9447; *In re McCrory Stores Corporation,* 14 F. Supp. 739 (D. C. S. D. N. Y., 1935); *In re Burns Brothers,* 14 F. Supp. 910 (D. C. S. D. N. Y. 1936).

The existence of this power cannot be denied and is conceded by petitioners. (Pet. Br. p. 63.)

B. Certiorari should not be granted to determine from the facts whether or not the District Judge, in approving a particular compromise, was guilty of an abuse of discretion.

Since the District Judge had the power to compromise the Standard claim, the only question presented on appeal to the Circuit Court of Appeals was whether or not in doing so he abused his discretion. This principle was applied in approving compromises in the cases of *In re Riggi Brothers Co.,* 42 F. (2) 174 (C. C. A. 2, 1930); *Pullman Couch Co.* v. *Eshelman,* 1 F. (2) 885 (C. C. A. 4, 1924); and *In re Orinoco Corp.,* 269 Fed. 344 (C. C. A. 6, 1920), in each of which this Court refused certiorari

(282 U. S. 881; 266 U. S. 631; 256 U. S. 694). All of the cases, including the action of the Circuit Court of Appeals in this case, are in harmony on this principle.* Courts of review are uniformly reluctant to intrude upon the discretionary powers of the Trial Judge who has seen and heard the witnesses, and is thus best qualified to appraise the conflicting contentions.

The question presented by the petition for certiorari is whether or not this Court will review the exercise of discretion by a District Judge on the facts of a particular case where the order has been affirmed after an exhaustive review of such facts by the Circuit Court of Appeals. The many practical and legal considerations which supported the action of the District Judge have been succinctly summarized by the Circuit Court of Appeals as follows:

> "The factors to be considered are: The amount of the compromise; the participation of Standard in the new securities under the amended plan as modified;

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*In addition to the three cases cited above, the following are typical:

In re Prudence Co. (C. C. A. 2, July 18, 1938) 384 Commerce Clearing House Fed. Tax Serv., Par. 9447;

West v. *Radio-Keith-Orpheum*, 68 F. (2) 869 (C. C. A. 2, 1934);

Drexel v. *Loomis*, 35 F. (2) 800 (C. C. A. 8, 1929);

American District Steam Co. v. *Waltermire*, 231 Fed. 412 (C. C. A. 6, 1916);

In re National Artificial Silk Co., 272 Fed. 938 (C. C. A. 6, 1921);

Gordon v. *Hartford Sterling Co.*, 179 Atl. 234 (Pa. 1935);

See also:

2 Remington on Bankruptcy, Sec. 1147 (Supp.);

Gilbert's Collier on Bankruptcy (3d Ed.), p. 567.

> the amount of the probable allowance in the event Standard should succeed in establishing its claim; the participation Standard would be accorded if its claim should be established; the uncertainty of the outcome of the contest over the claim; the time already consumed in litigation of the claim; the time it would probably take to litigate it to final determination; the delay and inconvenience of prolonged litigation; the adverse effect on the interests of creditors and stockholders of long continued administration of a business by a trustee under the supervision of the court; the fact that the compromise set aside the only transaction where Standard control resulted in benefit to Standard and detriment to Deep Rock and eliminated all doubtful and debatable items from the claim; and the fact that more than 60 per cent in amount of the preferred stockholders and 82 per cent in amount of the noteholders, after being fully informed of the relevant facts, approved the compromise and only slightly in excess of 20 per cent in amount of the preferred stockholders opposed it." (96 F. (2) 693, 703; Vol. I, pp. 492-3.)

A consideration by this Court of the particular facts of this case to resolve these factors would clearly exceed the limitations upon the granting of certiorari which have been uniformly announced and would result in no decision of importance or significance except to the present litigants. It is well established that this Court will not reexamine a decision in order to review the evidence, particularly when the District Court and the Circuit Court of Appeals have agreed in their interpretation of the facts. This Court, in the recent case of *General Talking Pictures* v. *Western Electric Co.*, 58 S. Ct. 849, 851 (1938), stated:

> "* * * Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. * * * Moreover, the decision on

that point rests on concurrent findings. They are not to be disturbed unless plainly without support."

See, also, *Wisconsin Elec. Co.* v. *Dumore Co.*, 282 U. S. 813 (1930); *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440 (1918).

Section 77B of the Bankruptcy Act was enacted for the purpose of effectuating an adjustment of conflicting rights when approved by two-thirds of each class of creditors and a majority of each class of stockholders under the jurisdiction and subject to the approval of the District Judge. Certainly, compromises of debatable and complex questions should be encouraged and preferred in this type of proceeding.

A controversy involving the so-called "instrumentality rule" is peculiarly appropriate for settlement. The late Justice Cardozo aptly observed, in *Berkey* v. *Third Avenue Railway*, 244 N.Y. 84, 91, 155 N.E. 58 (1926):

> "The whole problem of the relation between parent and subsidiary corporation is one that is still enveloped in the mists of metaphor."

If discretion should ever be exercised in approval of a compromise to avoid uncertainty of result, it was proper to exercise it here.

Petitioners' position as respects holding companies seems to be that if a parent's claim includes any items which are improper, *valid* items cannot be allowed. This inequitable view is in direct conflict with *Southern Pacific* v. *Bogert*, 250 U. S. 483 (1919). There it was held that the owner of 75% of the stock of a railroad could not wrongfully manipulate the reorganization of that railroad in such a way as virtually to exclude minority stockholders; but the decree of the District Court was modified

so as to give the majority stockholder the status of a creditor to the extent of its actual advances to the subsidiary in the payment of its creditors. Mr. Justice Brandeis said (p. 496):

> "Some adjustment should obviously be made so as to compensate the Southern Pacific for any contribution made at its expense to the value of the stock in the new company of which the minority stockholders may get the benefit. *The purpose of this proceeding is not to punish the Southern Pacific but to declare and enforce its obligation as trustee. The minority stockholders who seek equity should do equity;* and a court of chancery has power in granting relief to prevent unjust enrichment of the minority stockholders at the expense of the Southern Pacific." (Italics supplied.)

C. This Court will not review a finding of fact as to the value of the debtor's property lawfully made by the District Judge and affirmed after review by the Circuit Court of Appeals.

The finding of the District Judge as to the value of the debtor's property was a finding of fact. By the terms of the statute (Section 24 (b) of the Bankruptcy Act, 11 U. S. C. A., Sec. 47 (b)), on appeal from a confirmation of a plan the review is limited to issues of law. *Meyer* v. *Kenmore Granville Hotel Company,* 297 U. S. 160 (1936); *In re 620 Church Street Corporation,* 299 U. S. 24, 27 (1936). The finding is binding upon petitioners and cannot here be reviewed. It is based upon and clearly supported by the evidence, including the appraisal by the qualified and independent Trustee (which was confirmed by a thoroughly qualified expert) and by the full record made of the earnings of the enterprise, and analyses

thereof. (Vol. I, pp. 358-361, 401; Vol. II, pp. 514, 526-529, 537, 474-484, 649-650, 738-743.)

The attack by petitioners upon the appraisal as prejudiced and partisan is unsupported by the record and unworthy. The "detailed appraisal" filed by the Trustee was "an informed, independent judgment," within the principles announced in *First National Bank* v. *Flershem*, 290 U. S. 504, 525 (1934). This case cannot be likened to the inadequacy of proof presented in *National Surety* v. *Coriell*, 289 U. S. 426 (1933). The District Judge was fully informed as to all elements of value. The Circuit Court of Appeals held as follows:

> "The finding of value by the trial court is clearly supported by the evidence. The appraisal was made by the trustee, assisted by the technical staff of the Deep Rock organization, and was approved after a careful check by an independent expert, Mr. Berend. There was no showing that in making the appraisal any pertinent factor was disregarded. Due consideration was given to going concern value. The court was entitled to accept and act on such appraisal. In re Consolidation Coal Company, D. C. Md., 11 F. Supp. 594, 597.
>
> "The sole proof offered by the independent committee attacking the appraisal was that of Mr. Smith who frankly admitted he was not qualified to appraise the value of the producing properties. His appraisal was based solely on capitalization of earnings and on an arbitrary allowance for depletion demonstrably inadequate." (96 F. (2) 693, 707; Vol. I, pp. 498-499.)

Since the debt owed to the holders of Deep Rock notes plus the compromise figure of the Standard claim exceeded the value of the assets, as found by both the

District Judge and Circuit Court of Appeals (96 F. (2) 693, 707; Vol. I, p. 499), the repeated charge by petitioners that the $5,000,000 equity of preferred stockholders has been unjustly wiped out is obviously unfounded. Under the plan of reorganization the preferred stockholders of an insolvent corporation are allotted approximately 20% of the equity of the reorganized company, subject only to an issue of debentures aggregating ten million dollars, all of which goes to the public owners of Deep Rock notes.

D. The case does not involve any question of public importance.

The general charges of wrongdoing leveled at holding companies and reorganization committees cannot create issues which do not exist in this case. The same charges have been carefully examined by the District Judge and the Circuit Court of Appeals. Circuit Judge Williams in his concurring opinion flatly stated: "No fraud appears in the record." (Vol. I, p. 500.) There is no support in the record and none is suggested as a basis for the gratuitous accusations directed against this respondent committee. Throughout, the committee has in no way attempted to influence the Court, the Receivers, the Trustee, or their counsel to cease the attack against the Standard claim. The security holders have been fully advised of all material facts. (Vol. II, p. 570, and pp. 717-865, esp. pp. 833-835.) Before any solicitations were made the deposit agreement was submitted to the court and approved as fair after full notice and hearing. (Vol. I, pp. 83-88.) All depositors have been given repeated opportunity to withdraw, without expense, from their deposit with the

committee if they did not approve the plan or compromise. (Vol. II, pp. 728-729.)

We are content to rely upon the record, which shows that we have acted only with the approval of the court and that our conduct has been fair and honorable.

The petitioners have urged that the instrumentality rule is a highly important rule of law. The Court is therefore asked to "delineate the applicability" of this rule in reorganization proceedings. (Pet. pp. 36-37.) Since the opinion of *Erie Railroad Company* v. *Tompkins*, 58 S. Ct. 817 (1938), it is clear that the applicability of the rule is not a matter of general law, but is to be determined in each case in the light of the appropriate state law. Therefore, no general rule of uniform application could be announced, and any supposed conflict "may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin* v. *New York Life Insurance Company*, 58 S. Ct. 860, 861 (1938).

CONCLUSION

This reorganization and the petition involve no novel questions of law or any other issues of importance to the public as distinguished from the private litigants. Two courts have recognized that the Standard claim was fairly debatable and properly the subject of compromise, and have found that the debts exceed the value of the assets of the debtor. Nevertheless, this respondent committee has effectuated a plan of reorganization granting to the preferred stockholders a substantial participation in the securities of the reorganized company, being approximately twenty per cent of the equity. The compromise and plan also subordinate Standard to the debentures to

be issued to the public noteholders. The continued litigation of the Standard claim on the merits would jeopardize this result and the interests of the public holders of notes and preferred stock.

We submit that for the reasons stated and because the decision of the Circuit Court of Appeals does not fall within any one of the classes of decisions defined in paragraph 5 (b) of Rule 38 of this Court, the petition should be denied. Petitioners have had hearings which were full and fair before the Special Master, the District Judge and the Circuit Court of Appeals. They are not entitled to "another hearing." *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923).

Respectfully submitted,

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